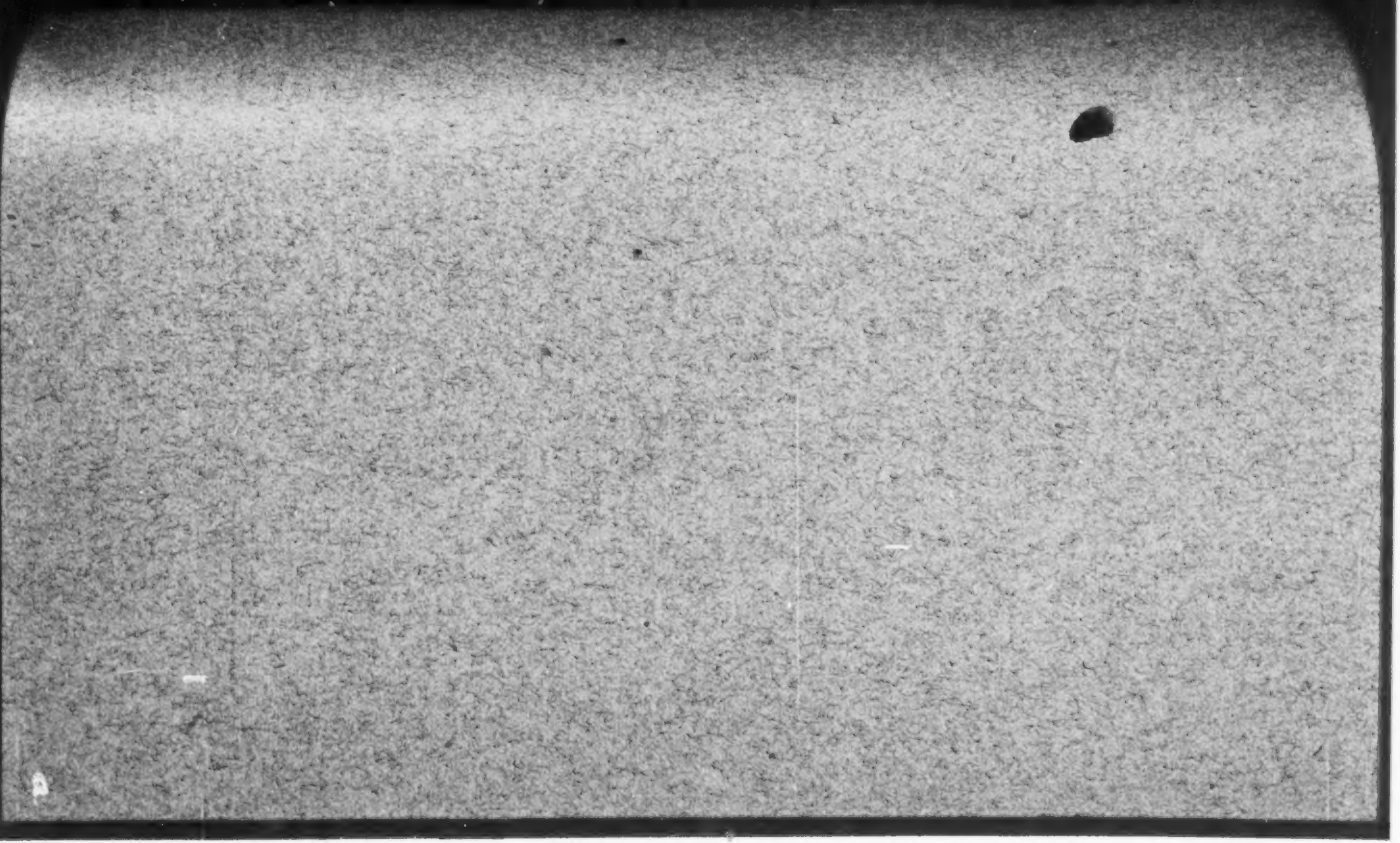

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SUPREME COURT OF THE UNITED S

OCTOBER TERM, 1900.

No. 281.

Filed Dec. 19, 1900.

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

ANN WARNER, ET ALS., HEIRS AT LAW OF JOHN G. WARNER, DECEASED, ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. Supplemental Brief for Petitioner.

SAMUEL L. GILMORE,
City Attorney.
F. B. THOMAS,
Assistant City Attorney.
BRANCH K. MILLER,
Solicitor for Respondent, the City of New Orleans.

December, 1900.

L. Graham & Son, Ltd. New Orleans.

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SUPREME COURT OF THE UNITED STATES.

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THE CITY OF NEW ORLEANS, PETITIONER,

versus

ANN WARNER, ET ALS., HEIRS AT LAW OF JOHN G. WARNER, DECEASED, ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, Supplemental Brief for Petitioner.

In reply to the argument for Respondents, exploited both orally and in the several briefs filed in their behalf, that the points now insisted upon by the Petitioner were not raised before the Master, but, it is sufficient to say that they were considered by the Master in manner and form as now presented and were made by him the subject of a special report (see Record, p. 106 *et seq.*); besides this, under the same exceptions, the present contentions of Petitioner were entertained and passed upon by the Circuit Court, and were made the subjects of the assignments of error for the appeal taken by petitioner from the Circuit Court to the Court of Appeals (see Record, p.

150). These were disposed of by the Court of Appeals itself by its decision, that all questions thereby raised had been settled adversely to the appellant in 167 U. S., p. 462, and 175 U. S., p. 120 (see Record, p. 164).

It would appear therefore that the exceptions made before the Master, in his appreciation, sufficiently raised the questions which are now noted, so far as to provoke his special report upon the same adversely to Petitioner that the findings of the Circuit Court, sustaining those of the Master, would show that the issues were made and contested by Respondent before that tribunal; that the conclusion of the Court of Appeals that all of these, which were set out in the assignment of errors, upon which the case was carried to that court, had been already passed upon by this court adversely to Respondents, surely demonstrates that the Court of Appeals had no difficulty in entertaining the issues which are now made.

The objection of Respondents to the sufficiency of the showing made before the Master, would appear more extraordinary in view of the fact that no such exceptions or point was made by them before the Master, before the Circuit Court, or before the Circuit Court of Appeals, but makes its appearance for the first time here, upon a record which shows that Respondents at all times had conducted themselves as though the questions now before the court, were matters fully cognizable before the Master, before the Circuit Court, and before the Court of Appeals.

The suggestion that Ann Warner, Joanna McCrossin, Mary E. Warner, and Henry Warner, the legal heirs of John G. Warner, by reason of his death substituted as parties complainant in the record, and John J. Donaldson are not parties to the appeal from the Circuit Court to the Court of Appeals, is addressed to this Court to little purpose, since who was bound by that appeal, is a question for the courts from which, and to which, it was taken, and can fairly form no part of the discussion here; the

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appeal was taken in open court, and hence no citation was necessary to any of the parties (see Record, page 149); the name of John G. Warner appears in the appeal bond instead of that of his heirs substituted complainants, and the name of John J. Donaldson does not appear in the bond at all (see Record, page 152); it was clearly the understanding of Respondents that those parties whose names were omitted, were parties to the appeal, especially so by the stipulation found on page 148 of the record, in which it is expressly declared that the appeal was taken from the decree rendered in favor of the several parties, the Warner heirs, and John J. Donaldson being mentioned as some of these; in the stipulation found on pages 145, 153 and 154, the name of the complainant in the case is set out as John G. Warner, which would show notwithstanding his death, and the substitution of his heirs in his place and stead, that the use of his name in this connection was a sufficient description of the parties complainant to the suit; besides the stipulation on page 165 of the record, in caption of which "Ann Warner et al." are declared to be the "appellees" in the suit, while the signature of respondents' attorneys (page 166) declares them to be "attorneys for Ann Warner et al." Referring to the statement made in oral argument and brief for respondent, that the rule stated in 2nd Daniell's Chancery Practice, 1210, had been overruled, as would appear by note "a" to that section, an examination of note "a," as well as the case of Richmond vs. Irons, 121 U. S., page 27, relied on by respondents to bear out their statement will show that the doctrine relied on by petitioner has not been overruled, but on the contrary is expressly affirmed by that case (121 U. S., 52), which declares that before a creditor appearing to avail himself of a decree, can be allowed any of the advantages thereof, he must prove that he was a creditor at the time of the filing of the bill, and that any defense which existed at that time to his claim,

either to diminish or defeat it, might be interposed either before the Master, or on the hearing of the court; that it was only after his claim had been established, that the intervenor became entitled to the benefit of the proceeding as virtually a party complainant from the beginning; the plea of the statute of limitations which was set up against the creditor appearing in that case, would have been maintained had the requisite time elapsed before the filing of the bill; all that the case holds is, that the commencement of the proceeding suspends the statute of limitations, as to any creditor whose claim is not prescribed or barred by limitation, when the bill was filed, and who afterwards succeeds in establishing that he is a creditor, as against any defense existing at the filing of the bill, which may be pleaded to his demand.

The grounds of defense urged against the warrant holders, who subsequently intervened, if they are well founded, existed prior to the filing of the original bill in this case, and hence under the very case of Richmond vs. Irons, were unaffected by the proceedings instituted by Warner.

It may be here repeated that if any allowances for damages is made for any portion of the Three hundred thousand dollars of warrant issued under the act of 1876, the Court would then hold the City of New Orleans responsible for drainage work which had not been done by the Canal Company and Van Norden, by reason of the City's fault, in the face of the fact that in Peake vs. New Orleans, 139 U. S., page 342 *et seq.*, this Court found that the City was not liable for the same kind of work, which in point of fact had been done, or upon warrants issued in payment of such work.

As to the twenty thousand dollars of warrants, in addition to the three hundred thousand dollars for which there was a pretense of authority, which were introduced into the act as a gratuitous assumption by the city, the same

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may be considered in the same view as that suggested concerning such of the three hundred thousand dollars of warrants as might be considered a compensation for work which Van Norden and the company were prevented from doing, by reason of the city failing to furnish the lines and levels therefor.

This twenty thousand dollars of warrants given in reimbursement of drainage taxes diverted to the City's general purposes, instead of being applied to the drainage warrants, was not an unlawful diversion under the doctrine of the Peake case from a purpose which was lawful, and hence the diversion gives no ground for reimbursement.

The claim of Wilder & Company, which was reduced to a judgment at law (see Record, page 158) in an action brought by Wilder & Company upon the law side of the court, during the pendency of this present suit of Warner vs. New Orleans, gave Wilder & Company no greater rights so far as concerned the fund established in this case than they would have had if they brought no action at law, but sued upon their warrants alone; it should be observed that the judgment at law is in the precise terms of the warrant itself—that is, "payable out of drainage taxes, and judgments created and rendered under, and in pursuance of said acts No. 165 of 1858, No. 191 of 1850, No. 57 of 1861, and No. 30 of 1871, and act No. 16 of March 24, 1876."

It was never at any time disputed that these warrants were payable out of the drainage taxes when collected; the terms of the warrants being simply duplicated by the terms of the judgment, the meaning of the latter is precisely the meaning of the former, no more, no less, but conferred only such rights as had existed and in point of fact were fully recognized, not only before the Wilder judgment was rendered, but before the action therefor was commenced.

It required the present suit and all the proceedings and decrees herein to bring to the drainage warrant holders any nearer payment, than they were before; but this extended or not to Wilder & Company, the same before as after they had obtained their judgment, which of itself established no rights whatever to the fund established in this case, and the distribution of which was the subject of consideration by the Master; this sufficiently appears by the action of Wilder & Company themselves, who formally appeared before the Master to establish their claim, which would have been unnecessary, if, it had been already sufficiently established, for the purpose of sharing in the benefits of the decree in this case, by the judgment of law which they had previously obtained; this is specially shown, by the conduct of Wilder & Company before the Master, in relying upon, *not* their judgment at law alone, but also the warrants themselves, upon which it was founded (see Record, page 130).

The circumstance that two of the warrants of Wilder & Company had been previously paid out of drainage taxes admits nothing, except the fact, which has never been disputed, that whenever the drainage taxes were collected they were applicable to the warrants.

In reference to a question asked by a member of the court, whether the city, before the master, filed any formal answer setting up defenses against the allowance of any of the claims of the intervenors, it may be said that the decree of the Circuit Court of Appeals allowed such warrant holders as were entitled to establish their claims before the Master to do so, "without being required to file formal interventions or to obtain special leave of the court," and hence, no pleadings being required by the claimants, neither could it be exacted from the defendant (see Record, page 96).

Touching the claim of Respondents, that Petitioner should be mulcted in damages for the taking of the present

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proceeding, it may be said that the execution of Respondent's decree has not been delayed one hour by any of the proceedings which have been taken since its entry; the appeal from the Circuit Court of Appeals was without *supersedeas*, and hence interposed no obstacle to the enforcement of the decree; the application to this court for a *certiorari* to review the decree of the Court of Appeals, has likewise placed no hindrance in the way of Respondent's satisfaction of their judgment; the grevious offence of Petitioner's application for *certiorari*, which is so plausibly railed at by Respondent's brief, may be considered venial, in view of the larger offence of this Court of granting the writ, the application of which is treated as so great a shock to Respondents.

It is deemed not improper to state here a fact which, doubtless by an inadvertence, was not mentioned in Respondent's brief; this is, that they have issued their execution upon the decree of the Circuit Court, and have actually proceeded to obtain payment of their decree, a circumstance which finds itself in strange company when placed alongside of their very spirited demand for the imposition of damages occasioned by the delay of obtaining satisfaction of their decree, brought about by the present decree.

Respectfully submitted,

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Assistant City Attorney.

BRANCH K. MILLER,

Solicitors for Respondent, the City of New Orleans.

December, 1900.